Enforcement of Legislation Prohibiting Sales Below Cost in Washington

Eldon H. Reiley
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Mr. Reiley analyzes Washington's complex Unfair Practices Act from the strengths and weaknesses of the defendant's position by tracing the various requirements and defenses of the act under two recent Washington Supreme Court decisions. To facilitate effective enforcement he offers specific suggestions for future interpretation of the act. Mr. Reiley especially urges that the intent to injure requirement be interpreted to require nothing more than proof of injury to a competitor and that the meeting competition defense be limited to require a seller to have actual knowledge of his competitor's current prices and their legality.

After nearly twenty years of lying dormant,1 the Washington Unfair Practices Act2 has been subject to a recent rash of litigation that appears to be the herald of widespread new endeavors to prohibit selling below cost. Suit was recently commenced in Seattle by a major oil company against eight competitors for allegedly selling gasoline below cost.3 Threat of action under the act was used to stop a grocery price war in Spokane in January 1965 and again in October 1966.4 Martin v. Aleinikoff,5 decided in 1964, was the first case to reach the Wash-

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1 The law was enacted in 1939. The only cases under the law to reach the Washington Supreme Court between that date and 1964 were State ex rel. Pay Less Drug Stores v. Sutton, 2 Wn. 2d 532, 98 P.2d (1940), and State v. Sears, 4 Wn. 2d 200, 103 P.2d 337 (1940).
2 WASH. REV. CODE ch. 19.90 (1959). Relevant sections of this statute are set out in full in Appendix, Part A.
3 Tidewater Oil Co. v. American Oil Co., Humble Oil Co., Richfield Oil Co., Socony Mobile Oil Co., Shell Oil Co., Standard Oil Co. of California, Texaco, Inc., Union Oil Co. of California, King County Super. Ct. No. 631536. A judgment of voluntary nonsuit was filed Sept. 3, 1965.
5 63 Wn. 2d 842, 389 P.2d 422 (1964).
ington Supreme Court since 1940, and State ex rel. O’Connell v. Albertson’s, Inc., decided in 1966, is the only below cost sales case to reach the court after a full trial on the merits.

The Unfair Practices Act prohibits: (1) selling a commodity below cost; and (2) discriminatory pricing between different sections of the same community.

Washington law makes each violation not only a criminal offense but also subject to a civil suit for an injunction or damages. Thirty states have enacted similar laws aimed at below cost sales generally.

The unresolved legal problems confronting enforcement of below cost sales legislation range from constitutional quandries to questions involving allocation of the burden of proof. It is the purpose of this article to probe into some of these problems, and especially to highlight the strengths and weaknesses of the defendant’s position in an action under the Washington statute.

Legislation of this nature proceeds on the assumption that below cost or “loss leader” prices are economically undesirable because they tend to mislead the public by giving a false low cost image and tend to eliminate competition by destroying weaker competitors. Such actions are, therefore, declared unlawful. A merchant is free to compete as he chooses in the above cost area, but he may lower his prices below cost only within carefully prescribed statutory limitations. Discussion of the merits of the economic policies behind the law will be avoided. Questions as to the economic desirability of such legislation

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6 State v. Sears, 4 Wn. 2d 200, 103 P.2d 337 (1940). In 1959, the Court was indirectly concerned with the statute in Johnson v. Pate, 54 Wn. 2d 148, 335 P.2d 131 (1959), where it held that a writ of prohibition was not the proper mode of review of a temporary injunction.


14 There has been considerable comment on this aspect of the legislation. Those favoring it include: Brandeis, Cutthroat Prices: The Competition That Kills, Harper’s Weekly, Nov. 15, 1913, pp. 10-12; Clark, Statutory Restrictions on Selling Below Cost, 11 Vand. L. Rev. 105 (1957). Those opposing the legislation include Comment, Sales, Below Cost Prohibitions: Private Price Fixing Under State Law, 57 Yale L.J. 391 (1948); University of Washington Bureau of Business Research, Regulation of Retail Competition in Washington 33 (1963); Note, 42 Wash. L. Rev. 945 (1967) and authorities cited therein.

See also the comments of Hale, J., dissenting in State ex rel. O’Connell v. Albertson’s:

The Unfair Practices Act was thus designed to exercise the state’s police powers in the field of trade and commerce; to convert the predator into a com-
have been resolved in its favor by the legislatures of this and most other states, and constitutional challenges to the legislation have met with almost unanimous rejection.\\(^15\\)

I. WHO CAN SUE?

Among the most remarkable features of the Unfair Practices Act are its self-enforcement provisions. Not content to rely upon criminal actions brought by the prosecuting attorney\\(^16\\) or suits brought directly by the attorney general,\\(^17\\) the legislature authorized "any person" to go to court.\\(^18\\) Where only injunctive relief is sought it is not even necessary for the plaintiff to plead or prove actual damage as a condition of relief.\\(^19\\)

The extent to which this carte blanche invitation to suit is limited by requirements of "standing" or the existence of a "case or controversy" has not been litigated in this state. Obviously, there are some limita-

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\(^{15}\) Ibid.  
tions. It is doubtful that a consumer in Walla Walla could challenge the potato prices of a supermarket in Bellingham, but query whether a Walla Walla potato grower could. The enforcement provisions do indicate a legislative desire to have the law widely (or cheaply) enforced—at present an unachieved result.

The statute removes the injunctive remedy from the equity side of the court. If a violation has occurred, the court is directed to issue a permanent injunction. There is no room for the exercise of discretion. There are no issues of "adequacy" of the legal remedy or "irreparable harm." The only question is whether an illegal sale below cost has occurred.

Despite the fact that the civil remedies are available to anyone, enforcement actions are usually undertaken by the attorney general, by a trade association or by a competitor of the defendant. Actions by trade associations have occasionally been struck down in other jurisdictions as price-fixing violating the federal anti-trust laws. In such cases the association has usually been engaged in an attempt to fix minimum prices without reference to the actual cost to the seller. But any combination of competitors with reference to prices is questionable under the federal laws, and enforcement of this statute by a trade association of competitors inevitably provides a defendant with a potent argument.

In an action by an individual competitor a "clean-hands" question may be raised if the plaintiff has recently sold items below cost. However, since the complaining competitor is merely an instrument in the legislature's device for enforcement of the statute, and since the injunction authorized by the statute is not discretionary, the cleanliness of the plaintiff's hands should be irrelevant.

An enforcement action by the attorney general should be immune from price-fixing objections. The laws of some states establish a special commissioner, who may become a kind of price-czar, passing on the legality of prices before they are offered. If a state official broad-

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20 Ibid.


23 The Idaho Unfair Sales Act allows the governor to supervise the administration of the act himself or to delegate this authority to "any department of the state government." IDAHO CODE ANN. § 48-408 (Supp. 1965). A Director of Fair Trade
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casts to a group of competing merchants the price at which they can legally sell certain commodities at some future time, the result is much the same as the price-fixing the federal laws are designed to prevent. Even without a statutory price-czar, an attorney general could become involved in this delicate area, if in addition to bringing enforcement actions, he passes judgment on the legality of specific prices before they are offered.\textsuperscript{24}

Other problems face the attorney general when he brings an action after a period of nonenforcement, or against only one merchandiser when others are selling below cost, or with respect to one commodity when others are being sold below cost. He is likely to be charged with discriminatory enforcement. To maintain such a challenge successfully, the defendant must show not merely that the attorney general is picking and choosing his case, but that he is deliberately or arbitrarily persecuting the defendant and ignoring other obvious violations.\textsuperscript{25}

In Washington a number of the enforcement actions have been commenced by or on behalf of agricultural commodity commissions created under the Agricultural Enabling Act.\textsuperscript{26} Such actions are brought with respect to the commodity or group of commodities with which the commission is concerned. In these cases the commission does not sue out of concern for the consumer interest or even the retail competitor, but is, rather, seeking to protect the commodity producer by maintaining a floor under retail prices. This interest, while legitimate, (and while such action by the commission is clearly authorized by the Agricultural Enabling Act\textsuperscript{27}) is not necessarily identical with the stated purpose of the Unfair Practices Act.\textsuperscript{28}

and Unfair Sales Acts has been appointed. The Director is frequently asked to advise whether a competitor's price is legal so that it may be met. (See discussion of meeting competition defense, \textit{infra}.) He is occasionally asked to clear a price in advance. Interview With Winfield D. Stearns, Idaho Director of Fair Trade and Unfair Sales Act, January 11, 1967.

\textsuperscript{24}The meeting competition defense, \textit{Wash. Rev. Code} § 19.90.070(4) (1959), allows a merchant to meet the prices of a competitor by selling below cost only if the competitor's prices are legal (or believed to be so). A merchant cannot be expected to ask his competitor what it paid for its sale item. There must be other methods to determine legality quickly. See note 77 \textit{infra}. It is, therefore, inevitable that a responsible state official will be requested to advise merchants whether they can legally meet a price under the meeting competition defense. Efficient administration of the statute requires that this advice be given. Query: Is this to be distinguished from advising a merchant what price he can legally initiate? For a discussion of this problem see \textit{People v. Gordon}, 234 P.2d 287, 293-94 (Cal. Ct. App. 1951).


\textsuperscript{27}\textit{Wash. Rev. Code} § 19.90.910 (1959) provides:

\textbf{Construction.} The legislature declares that the purpose of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to
objections based on this ground, the commissions have frequently asked the Attorney General to bring actions in his name. In view of legislative reliance on private enforcement, however, the actual motives of the plaintiff—whether he be a consumer, a competitor or a commission—should be irrelevant.

It has been generally assumed that a violation of the below cost statute requires proof of: (1) a sale or advertisement, (2) at a price below cost, (3) which produces an injurious effect, (4) which is done with a proscribed purpose or intent, and (5) which is not justified by one of the defenses enumerated in the statute.29 In the comments that follow, the cost, injury, and intent requirements and the meeting competition defense will be examined.

II. THE COST CONCEPT

The statute30 defines “cost” as “the invoice cost or replacement

foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented. This chapter shall be liberally construed that its beneficial purposes may be subserved.

Most states, including Washington, patterned their statutes after the California laws, CAL. BUS. & PROF. CODE §§ 17000-17100 (West 1964). Through typographical error, California originally enacted its law to require “literal construction” instead of “liberal construction.” CAL. BUS. & PROF. CODE § 17002 (West 1964). This error was corrected by the California Legislature in 1941. In their haste to follow California’s example, six other states—Arkansas, Colorado, Kentucky, Montana, Nebraska and Wyoming—enacted California’s typographical error, requiring later amendment.

It will be noted that the purpose expressed in the Washington statute is protection of competition and protection of competitors. One authority has submitted that laws regulating competition can be classified into those whose purpose is to protect competitors and those whose purpose is to protect competition:

These laws regarding competition are of two kinds. The first, exemplified by the antitrust laws, seeks to foster and preserve the freest sort of competition. The second type, exemplified by Fair Trade and Robinson-Patman, is designed to place limits upon the free play of competition in the alleged interest of these firms which, for one reason or another, are not equipped to survive the storms of rigorous competition.... To state the matter in its simplest terms, there appears to be an attempt to bring through governmental intervention into the economy at one and at the same time free competition and what... might be called fair competition.


It has been argued that the dual purposes of protecting competitors and protecting competition may be incompatible when both purposes are sought to be achieved by a blanket prohibition on below cost selling; in fact, such prohibition may operate to defeat both purposes:

The blanket prohibition,... when they depend for their enforcement on private action, are peculiarly vulnerable to control by the larger units whose interest in price stability is the greatest, thus assisting the very competitors against whom sales-below-cost prohibitions are often said to be directed.


29 WASH. REV. CODE § 19.90.070 (1959) (closing out a stock, disposing of damaged goods, acting under court order or meeting competition).

cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.”

A. Invoice Cost

Unless the seller is producing his own products or has conspired with his supplier to falsify invoice prices, actual invoice cost of a given item to the seller is readily determinable. If the seller has purchased the sale item in several lots at more than one invoice price, he might appropriately average the total cost over the number of items placed on sale to produce an “average invoice cost.” It would clearly not be within the spirit of the statute to contend that the lowest invoice price established the invoice cost for the entire lot (although this might establish the replacement cost).

Occasionally a seller will contend that he should be permitted to purchase several grades of the same item and sell the high grades and the low grades at a single price based on an average invoice cost. This scheme results in a below cost sale of the higher grades (to say nothing of the consumer deception that may inhere in such a practice) and should be considered a violation of the act.

B. Replacement Cost

Replacement cost is a more elusive concept, not expressly defined in the Washington statute. The principal problem lies in determining what period in time will be used to establish replacement cost. Some statutes provide that the lowest market price in a specified period of time—usually the thirty days preceding the sale—will be considered to be replacement cost. In the absence of such a definition, the question is raised whether it is proper to look back through an earlier period for a low replacement cost, and, if so, how far back one may look.

These questions should be answered by considering the legislature’s purpose in including the replacement cost concept in the statute. If a merchant made a bad buy on a product some time before his sale, or if he purchased the product prior to an unexpected decline in the cost of that product, he will be stuck with a high cost inventory although the

same goods are available to others at much lower cost. In such a case, the merchant should not be held to his invoice cost but should be able to sell the item at a price based on current replacement cost. To allow the merchant to do so tends to strengthen rather than injure competition.

Two factors should be present before replacement cost is invoked. First, the lower replacement cost should have been an actual market price either at the time of the sale or during the period prior to the sale when the goods in question would customarily have been ordered by the seller to supply his stock for the sale in question. (This prior period should in no event extend to a time earlier than the date the merchant's actual inventory at its higher invoice cost was ordered.) Second, there must actually have been a supply of the product in existence which could have been purchased at the lower replacement cost in a quantity sufficiently large to replace the old stock of goods being sold.

For example, assume that the Holiday Bake Shoppe advertises plum puddings at forty-nine cents per pound as a featured sale item the week before Christmas. At the time of the sale, and for two weeks before, the wholesale price of these plum puddings (i.e., the price at which Holiday Bake Shoppe could buy them) was fifty-three cents per pound. Earlier, the wholesale price had been forty-eight cents per pound. Holiday manufactured on its own premises about one-third of the plum puddings that it sold during the sale. Its manufacturing cost for these was forty-five cents per pound. The other two-thirds it ordered one month before the sale at forty-eight cents per pound.

Holiday takes the position that eleven months before the sale plum puddings were available on the market at thirty-five cents per pound and that its replacement cost is, therefore, thirty-five cents or, in the alternative, its forty-five cent manufacturing cost was its replacement cost. To allow the Holiday Bake Shoppe to justify its Christmas price with a "replacement cost" based on the market price of the preceding January would be a gross distortion of the replacement cost concept.

Holiday's manufacturing cost is not its replacement cost, because it had no additional "home-baked" plum puddings available. (Even if Holiday's plum pudding capacity were not exhausted by the puddings it did make, it chose not to make any more, and by its own action there was no available replacement supply at that cost). The manufacturing cost is part of Holiday's invoice cost. Its lowest invoice cost would be
forty-seven cents, a weighted average of forty-five and forty-eight cents.

The only real question about Holiday’s replacement cost is whether it is the wholesale price at the time of the sale or the wholesale price two weeks before the sale. If it is customary in the trade to order this item two weeks or more in advance, Holiday can reasonably contend that its replacement cost was forty-eight cents.

At either figure, replacement cost is irrelevant because the forty-seven cent invoice cost is lower. Holiday’s forty-nine cent sale price is below cost if its cost of doing business is more than two cents per pound.

C. Cost of Doing Business

The act requires that the cost of doing business be added to the lower of invoice or replacement cost to compute the legal selling price. Allocation of the cost of doing business to each item sold is far from a precise process. Yet the merchant who is trying to abide by the law needs to know at what price he can sell his commodity without risking criminal prosecution or an injunctive action.

The Washington statute merely defines cost of doing business by addressing itself to those expenses usually labeled “overhead.” While this definition is not worded in precise accounting concepts, it is a definition with which accountants can work and has been tentatively approved by the Washington Supreme Court. It does not, however, remove the uncertainties inherent in cost accounting, but it is doubtful that any statutory definition could achieve such a result.

The cost of doing business not only varies from merchant to merchant but between different stores owned by the same merchant and between departments in a single store. Furthermore, allocation of cost to a particular commodity also depends on the method of cost accounting followed.

\[^{32}\text{WASH. REV. CODE § 19.90.010 (1959) defines “cost of doing business” or “overhead expense” as “all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: Labor (including salaries of executives and officers), rent, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.}^{32}\]

\[^{32}\text{State v. Sears, 4 Wn. 2d 200, 214, 103 P.2d 337, 344 (1940). The Washington court gave qualified approval to the statutory definition of “cost of doing business.” It was noted by the court that it was considering the adequacy of the definition solely on the basis of the statutory language, and that it was hampered by the lack of a proper factual background. The court was “not prepared to say... judged by the language of the statute alone, that simple and proper accounting practices will not disclose the necessary information.”}^{32}\]
Returning to Holiday Bake Shoppe, the question is whether the cut-price plum pudding should bear the same proportion of overhead cost as every other item in the store. For convenience, the cost of doing business is frequently expressed as a percentage of the costs of goods sold (i.e., \( x \) per cent of invoice cost). It does not follow, however, that overhead expenses are necessarily to be allocated according to the ratio established by the cost of goods sold of the item in question, divided by the cost of goods sold of the entire department or the entire store. The cost of goods sold approach is an easy and very common method of allocating indirect expenses. However, when Holiday is pressed to defend its plum pudding sale it may advance any or all of the following arguments: (1) some or all of the indirect expenses should be allocated according to floor space and since plum puddings are a small-size but high-cost item this will produce a substantially smaller cost of doing business allocable to the puddings; (2) certain items handled by the bake shop, such as cream puffs, require special handling and refrigeration and a proportionately larger amount of the indirect expenses should be allocated to them; (3) if a substantially larger number of plum puddings were sold during the sale than normally would have been sold, then the cost of doing business per plum pudding during the sale is less than at other times; (4) low margin items should not bear as much overhead as high margin items.

These arguments suggest the wide range of problems that may be raised by a defendant prosecuted for selling at or very slightly above his invoice cost. The Washington statute attempts to overcome these problems by providing that proof of average over-all cost of doing business for any particular inventory period when added to the invoice or replacement cost \(^3\) "shall be presumptive evidence of cost." This clause allows the enforcer to fulfill his burden of proof by a more or less prefatory showing, but the defendant may still establish that his actual cost of doing business, with reference to the particular commodity at the time in question, was different from his over-all cost of doing business.

A number of states, including Idaho, \(^35\) specify a fixed minimum percentage above invoice cost as an arbitrary cost of doing business, \(^36\) which gives the retailer assurance that he has not violated the statute if

\(^36\) See 2 Trade Reg. Rep. ¶ 6709 (1965).
he marks up his commodity to at least the stated percentage. Although this approach eliminates most of the arguments outlined above, it is arbitrary and inflexible. It fails to allow for variations in efficiency between different retailers, or for overhead expenses that do not bear a direct relationship to the cost of goods sold. If no such allowance is made, it is questionable whether cost of doing business ought to be taken into account at all in a below-cost sales statute.

It is submitted that below-cost sales legislation would be improved by disregarding the cost of doing business. A violation should be defined merely with reference to invoice cost or replacement cost, whichever is lower. In such a statute invoice and replacement cost should be more carefully defined to include, not only actual invoice price, but also costs of shipment and any manufacturing or packaging processes that take place after the item is acquired.\(^{37}\)

III. THE INJURY AND INTENT PROBLEM

The most significant portion of the Washington Unfair Practices Act is the 141-word sentence constituting section 19.90.040,\(^{38}\) set out in the appendix to this article. The Washington court has noted that this sentence "is not a model of legislative draftsmanship.\(^{39}\) It is clear, however, that proof of injurious result is an essential element of some types of violation as is proof of predatory purpose or intent. What is not clear is whether both injury and intent must be proven for all violations, and what type of injury or intent must be established in those instances where one or both are required.

\(^{37}\) For a time, the Washington law was enforced with respect to fryer chickens only if a retailer sold the fryer below his invoice cost, no allowance being made for the cost of doing business. It was found that certain retailers circumvented the law, as so enforced, by buying chickens before they had been dressed. They thus carried on a number of manufacturing processes within the retail store. This greatly increased their cost of doing business but it decreased their invoice cost. Interview With William Mudge, Manager, Washington State Fryer Commission, January 12, 1967.

\(^{38}\) WASH. REV. CODE § 19.90.040 (1959) provides:

Price cutting practices forbidden—Generally. It shall be unlawful for any person engaged in business within this state to sell any article or product at less than the cost thereof to such vendor, or give away any article or product, for the purpose of injuring competitors or destroying competition, or to use any article or product as a "loss leader," or in connection with any sale to make or give, or to offer to make or give, any special or secret rebate, payment, allowance, refund, commission or unearned discount, whether in the form of money or otherwise, or to secretly extend to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, or to make or enter into any collateral contract or device of any nature, whereby a sale below cost is effected, to the injury of a competitor, and where the same destroys or tends to destroy competition.

A. The Injury Requirement

It will be noted that the statute refers to three injury concepts: (1) “injury of a competitor”; (2) “destruction of competition”; (3) “tendency to destroy competition.” The definition of “loss leader,” which must be incorporated into this sentence, refers only to injury to competitors, especially diversion of trade.

In practice it is much easier for the person enforcing the law to prove that a competitor was injured by diversion of trade than to prove that competition was destroyed. The evidence of injury available to the enforcer will generally be testimony of the defendant’s competitors to the effect that during the period of the defendant’s sale they did not sell as much of the sale items as they should have, and that their business was down generally. For example, in the Holiday Bake Shoppe case, Holiday’s competitors will testify that after Christmas they had 500 pounds of plum pudding left over which they had to sell at greatly reduced prices or throw out. This type of testimony will establish injury to a competitor, but does it prove destruction of or even a tendency to destroy competition?

If proof that competitors have actually gone out of business is required, it will not be possible to enforce the law until the evil it is designed to prevent, destruction of competition, has occurred. Consequently, even if the statute expressly required a showing of destruction of competition, it could be persuasively argued that, consistent with the purpose of the law and the direction to construe liberally, proof of something less than actual destruction of competition should establish the violation.

The Supreme Court of Kentucky has done precisely this in stating:

Our opinion is that to the extent a competitor is caused to lose business, competition is destroyed .... Considering the nature and the policy of the statute, we think the expressions “injuring competitors” and “destroying competition” were intended to describe one thing rather than two, that is, a reduction of competition at the expense of a competitor.

At the most the Washington statute merely requires a showing of a tendency to destroy competition. The language at the end of section

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43 Laundry Operating Co. v. Spaulding Laundry & Dry Cleaning Co., 383 S.W.2d 364, 366 (Ky. 1964)
19.90.040 is disjunctive: "where the same destroys or tends to destroy competition."\textsuperscript{44}

The specific problems posed by the particular phrasing of the Washington statute are: (1) whether the proof required to show a tendency to destroy competition is different from the proof required to show injury to a competitor; and (2) to which of the violations set forth in section 19.90.040 the tendency to destroy competition requirement applies.

In \textit{Martin v. Aleinikoff},\textsuperscript{45} the Washington court divided section 19.90.040 into six infinitive clauses followed by two adverbial phrases. (See Appendix, Part B.) For convenience, the grammatical designations used by the court in \textit{Martin} will be followed in this article, and reference will hereafter be made to infinitive clauses 1 through 6 and adverbial phrases "a" and "b".

The issue in \textit{Martin} was whether a secret rebate or an extension of special services was unlawful only if it resulted in a sale below cost. Narrowly read, \textit{Martin} merely holds that adverbial phrase "a" modifies and refers to infinitive clauses 4 and 5. It concludes that there is no violation of infinitive clauses 4 and 5 without a sale below cost. The opinion carefully leaves open the question whether adverbial phrases "a" and "b" apply to the other infinitive clauses.\textsuperscript{46}

In applying the injury requirement to a specific factual situation the attorney must now juggle four concepts: (1) the incredibly complex section 19.90.040; (2) the tortured grammatical analysis suggested in \textit{Martin}; (3) the definition of "loss leader" in section 19.90.010; and (4) the purpose of the statute, especially as expressed in section 19.90.910.

The following conclusions are suggested with respect to the injury requirement:

(1) It is never necessary to prove actual destruction of competition under the Washington statute. Proof of a tendency to destroy competition is in all events sufficient.

(2) It should not be necessary to prove even a tendency to destroy

\textsuperscript{44}While the Washington court has not construed this phrase, the Supreme Court of Minnesota has expressly noted that the language in the Washington statute provides a "less absolute, alternative basis for establishing a violation." State v. Wolkoff, 250 Minn. 504, 85 N.W.2d 401, 410 n.19 (1957).

\textsuperscript{45}63 Wn. 2d 842, 389 P.2d 422 (1964).

\textsuperscript{46}63 Wn. 2d at 850, 389 P.2d at 428. The court concludes that "'whereby a sale below cost is affected to the injury of a competitor' refers not only to the last antecedent, but to each antecedent to which it \textit{may} refer without impairing the meaning of the sentence."
competition as a separate element in establishing a violation under the loss-leader clause. The definition of "loss leader" in section 19.90.010 contains its own alternative elements of proof. Elements which are expressed as alternatives in the loss leader definition would become absolute requirements if it were held that adverbial phrases "a" and "b" apply and modify the loss leader clause, infinitive clause 3.

(3) It may be assumed as a corollary of Martin, that adverbial phrases "a" and "b" apply to infinitive clauses 4, 5, and 6 of section 19.90.040 and that in connection with secret rebates, special services, or collateral devices, it is necessary to show a tendency to destroy competition. However, even here it can be argued that a tendency to destroy competition is no different than proof of injury to a competitor through diversion of trade.

(4) It is not clear whether the injury requirements apply to the violations expressed in the first two clauses of section 19.90.040. Although the requirement may be applied without "impairing the meaning of the sentence," the reasoning of Martin is no longer applicable because the first two clauses clearly refer to sale below cost situations. Therefore, the two adverbial phrases need not be construed as limiting the sale below cost clauses. For this reason, it can be argued that if an injury requirement is read into the first two clauses, it should be a reasonable requirement that admits of proof consistent with the overall purpose of the statute. Thus, it should only be necessary to show injury to a competitor and such proof should be deemed to establish a tendency to destroy competition.

In the opinion of the writer, the statute should be interpreted, or amended, to make it clear that nothing more than proof of injury to a competitor is necessary to fulfill the injury requirement of the statute. (See Appendix, Part D.)

B. The Intent Requirement

Washington courts seem to have assumed that an intent to injure competition must be shown as an element of every violation of the

47 If the interpretation of this section could be approached as an original matter without regard to Martin, it would seem more logical to treat infinitive clauses 4, 5 and 6 as a single clause. It would then be clear that the adverbial phrases at the end modified this entire clause and only this clause. An illustration of the statute so broken down appears in the Appendix, Part C.

48 The Tenth Circuit has noted: "For surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor." Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir. 1959).

49 See note 46 supra.
Unfair Practices Act. In *Martin*, the court stated:50 "Intent to injure or destroy competition is, in truth, the touchstone . . . ." A similar statement appears in *State v. Sears*.51

The assumption that intent must be proven in each violation is extraordinary in view of the statutory language. Of the six infinitive clauses in section 19.90.040, only the second clause, directed at giving away merchandise, specifies that the purpose of the defendant must be shown. The other five clauses make no reference to intent or purpose. Ordinarily, it would seem that a reference to purpose in one clause with no reference to purpose in the other clauses would indicate a legislative design that intent was not required by the other clauses.52

No case prior to *State ex rel. O'Connell v. Albertson's, Inc.*,53 directly presented the issue whether proof of predatory intent is required. Deciding whether a sale below cost is a requirement of every violation, the court in *Martin* manipulated the clauses at the end of section 19.90.040 (result, not intent, clauses). The court, however, appears to have confused intent and result, or at least failed to distinguish the difference between proof of purpose and proof of result.54 The Ne-

In *Albertson's*, the state sought to establish a violation under both clause 1 (sale below cost), and clause 3 (loss leader). Although the trial court found a sale below cost which had injured competitors, it refused to conclude that there had been a violation of the statute on the ground that the state failed to show a purpose to injure competitors. The principal question on appeal appeared to be whether an intent or purpose to injure competitors was an essential element of the sale below cost or loss leader violation. In a five-to-four opinion, the supreme court affirmed the trial court, not on the intent question, but on the ground that defendant was within the meeting competition exception to the statute. The four dissenting judges, rejecting the meeting competition defense considered the intent problem. They concluded "...that the legislature intended by the first and third infinitive clauses (sec. 19.90.040) to prevent sales below invoice cost and the use of 'loss leaders,' regardless of intent or purpose."

Loose references to intent in earlier opinions seem to have been prompted by a concern that a statute containing criminal sanctions might be unconstitutional if it did not require proof of intent. The dissenters in *Albertson's* pointed out that there are many criminal statutes which require no proof of intent and which are, nevertheless, constitutional.

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53 137 Neb. 327, 289 N.W. 388 (1939).
54 289 N.W. at 395 (1939).
55 It will be noted therefore that in subdivisions (i) and (k) the prohibited acts are unlawful only where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly or to injure or destroy the business of a competitor. The act itself is not prohibited; it is the act accompanied by an intent to accomplish a result....

(Emphasis added.)
57 It was also argued in the case that *Wash. Rev. Code* § 19.90.060 (1959) ("...and in any such action proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition ...") indicates that all violations must require intent. The dissent concluded the presumption applies only where intent is expressly required and creates no requirement of intent under clauses 1 and 3. *Id.* at 265, 412 P.2d at 762.

The dissenters concluded, 68 Wash. Dec. 2d at 267, 412 P.2d at 763:

...in enacting laws to promote the general welfare or establish police regulations for public protection, or in authorizing the state to foster and preserve the public peace, health, safety and morals, in short, in defining conduct or actions malum prohibitum, the legislature may constitutionally omit intent, purpose or scienter as essential elements of the forbidden conduct.

Even if criminal intent were required, would not such intent normally be shown
Since proof of intent is expressly required only in connection with a clause 2 (give away) violation, such a requirement can be read into the other infinitive clauses only by implication. But the implication of an intent requirement tends to frustrate the purpose of the legislation. Such implication is, therefore, unwarranted unless necessary to save the statute from constitutional attack. It is extremely difficult to prove an intent to injure a competitor which is anything more than normal competitive intent. Actually, the competition which the statute seeks to "foster and encourage" is inseparable from an intent to injure competitors in the broadest sense. Competition arises from the desire to attract additional business from diverting business from the competitor.

In economic legislation of this type, the intent of the defendant should be irrelevant. The legislature has determined that certain pricing practices lead to economically undesirable consequences. Accepting this determination, the undesirable consequences follow no matter what intent is secretly harbored by the merchant price cutter. Most cases in other jurisdictions which have considered the intent question have done so in the context of the inquiry: Is the sweep of the law so broad as to make it an invalid exercise of the police power if it prohibits all below cost sales without limitation? Where the statute requires proof of either intent to injure or the result of injury, courts have had little difficulty in overcoming this constitutional objection. At least thirteen states (including both Oregon and Idaho) by proof of intent to sell below cost—not proof of intent to injure a competitor? (To convict a murderer, the state does not need to show that the defendant intended to deprive the victim's wife of a source of income, but merely that the defendant intended to inflict the fatal blow.)

In "Through the Looking Glass," we are told the walrus shed copious tears as he devoured the innocent oysters who had accepted his invitation to stroll along the beach. He meant them no harm, of course. He merely wished to eat them. Laundry Operating Co. v. Spaulding Laundry & Dry Cleaning Co., 383 S.W.2d 364, 366 (Ky. Ct. App. 1964).

Most decisions expressly upholding below cost sales statutes against such an attack include: May's Drug Stores, Inc. v. State Tax Comm'n, 242 Iowa 319, 45 N.W.2d 245 (1950); State v. Wolkoff, 250 Minn. 504, 85 N.W.2d 401 (1957); McIntire v. Borofsky, 95 N.H. 174, 59 A.2d 471 (1948). Only one decision has been found striking down a statute which required proof of either intent or result. Englebrecht v. Day, 201 Okl. 585, 208 P.2d 538 (1949).
presently have "either intent or result" statutes. The Washington law can readily be interpreted as an "either intent or result" law, if it is felt that an unlimited prohibition of sales below cost is too broad.

From the particular wording of the Washington statute, several conclusions can be drawn:

(1) It is clear that proof of purpose to injure competitors is required in connection with establishing a violation under infinitive clause 2, the give-away clause. The legislature may have felt that if a person is going to be in the posture of violating a law for giving away merchandise, a predatory intent should be shown in addition to the mere act of giving away.

(2) It is possible to argue that the purpose requirement in clause 2 also modifies clause 1. There is, however, no rule of statutory construction upon which to base an argument that the purpose requirement in a clause modifies preceding clauses.

(3) The presumption for proof of purpose in section 19.90.060 speaks of proving intent in connection with selling below cost and giving away merchandise. It does not speak of proving purpose in connection with loss leaders and is not a basis for building an argument that a loss leader violation requires proof of purpose.

(4) It must be borne in mind that a purpose to injure competitors, if this can be distinguished from a normal competitive purpose, is very difficult to prove. To the extent that proof of such purpose is required, it will greatly increase the difficulty and the burden on the plaintiff in enforcing the statute, a burden that seems inconsistent with the purpose of the statute expressed in section 19.90.110.

In summary, upon close scrutiny, it seems clear that the Washington statute does not require proof of intent in connection with a "loss

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It is clear that most state courts today would uphold a law which prohibited sales below cost without requiring proof of either intent or effect. Attention is directed to the comments in May's Drug Stores, Inc. v. State Tax Comm'n, 242 Iowa 319, 45 N.W.2d 245, 252 (1950):

We see no good reason to support the argument that intent must be a necessary element in order to save the constitutionality of the statute. The legislature is prohibiting an act, a business practice, declared to be destructive of competitors and free competition. The state of mind of the doer of the act is immaterial. The question whether the regulation bears a reasonable relation to the legislative purpose of protecting and promoting free competition turns upon the act or business practice prohibited and whether that act or business practice can reasonably be thought destructive of free competition. We see no dividing line which would say due process is served if the profitless sale with intent to injure either a competitor or free competition is prohibited and denied if that motive is not present. The legislature is not condemning a state of mind.
leader" violation. The only real intent questions should be whether the purpose language in clause 2, the give-away clause, also modifies clause 1, the sale below cost clause. The writer (and at least four of the present supreme court judges) would resolve this question in the negative to preserve the enforceability of the statute. If the court should decide that a "loss leader" violation does not require proof of intent, but that a sale below cost violation does, it would also be called upon to distinguish between a "loss leader" and a sale below cost. Although these terms are not necessarily synonymous, it is difficult to construct a distinction from the definitions in the statute. It is even more difficult to develop a logical argument for any such distinction.

Both the injury and intent problems could be greatly clarified by legislative action. A suggested redraft consistent with the foregoing comments (without making any substantive change) appears in the Appendix, Part D.

IV. THE MEETING COMPETITION DEFENSE

One section of the Unfair Practices Act carves out four exceptions from the operation of the statute: (1) a sale to close out stock or prevent loss by spoilage or depreciation of perishable or seasonal goods; (2) a sale of damaged or deteriorated goods; (3) a sale made under court order; (4) a sale made to meet competition. Each of these exceptions is accompanied by various qualifications and the statute should be read closely before attempting to invoke an exception. Other jurisdictions have held that the defendant has the burden of proving each of the facts necessary to bring his sale within an exception.

Cited:
Dewell & Gittinger, The Washington Anti-trust Laws, 36 Wash. L. Rev. 239, 276 (1961) indicate their conclusion that "loss leaders' conduct may violate the act even though not done with the purpose or intent or injuring...." See also the analysis of this statute by Marcus, Gillam & Greiner, Regulation of Retail Competition in Washington 35, 65. (Bureau of Business Research, University of Washington, 1963), which assumes that intent must be proven as an element of all violations.

It is clear that a loss leader necessarily involves a sale below cost; however, not all sales below cost need be loss leaders. A "loss leader," in the usual sense, is a sale designed to attract customers into the store so that they will purchase products other than the loss leaders. These other products may be marked up above the normal margin. It thus contains an element of deception and is directly harmful to the consumer as well as to competition. It is difficult to conceive of the possibility that a store, selling principally one item, would be able to engage in loss leader activity. For example, it is doubtful that a gas station selling gasoline below cost is selling gasoline as a loss leader. Yet the definition of loss leader in § 19.90.010 would seem to include even the service stations selling gasoline below cost.


The meeting competition exception requires that a merchant be engaged in an endeavor in good faith to meet the legal prices of a competitor who is selling the same article or product in the same locality or trade area and in ordinary channels of trade. The statute defines "ordinary channels of trade." It neglects, however, to define "trade area," "same article or product" or "competitor" (although it promises a definition of the latter term). The following comments suggest some filling for the statutory gaps.

A. The Same Locality or Trade Area

The conventional notion is that a trade area is limited by the distance consumers will travel to shop for a better buy of the commodity in question. It may be a small area for groceries and a larger area for furniture. Whether any given retailer is a competitor in the same trade area is a question of fact. An argument for a more expansive approach may be based on modern communication media because customers of a store in a small town may be exposed to ads from large cities. If the customers will actually travel to the large cities to obtain a better bargain, then a store in the small town should be entitled to "meet" the prices of the city stores. Clearly this depends on what the commodity in question is, not merely on whether the customers have been exposed to lower prices.

B. The Same Article or Product

This requirement poses a question of degree: at what point is item X so similar to item Y that it is the "same product" within the contemplation of statutory language? Although there has been very little litigation on this point, it is not to be expected that a court would require absolute identity. For example, merchant B should be able to sell drip grind Hills Brothers coffee below cost in order to meet the legal price of merchant A on regular grind Hills' Brothers coffee. But could merchant B meet a Hills' Brothers coffee price by selling Maxwell House coffee below cost? By selling imported Turkish coffee

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59 Wash. Rev. Code § 19.90.070(4) (1959) excepts a sale made in an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, in the same locality or trade area, and in the ordinary channels of trade as herein defined....


61 See note 69 supra.

62 Delineation of a trade area is closely related to the definition of a competitor or competition—the geographical aspect being merely one part of a competition definition. In Albertson's, the court treated the entire tri-city area of Richland, Pasco and Kennewick as a single trade area for a sale of fryer chickens.
below cost? Could merchant B meet a low price on Rinso soap by selling Tide soap below cost?

What if the manufacturer of nationally known soap X also packages the same soap for a large chain store under the name of the chain store and sells it for substantially less than brand X. May merchant B meet the chain store’s price on its specially packaged soap by selling soap X below cost? The product is the same except in name.\(^7\) The spirit of the statute would seem to indicate that if the difference between products is such that merchant B’s product is more desirable from an overall consumer point of view than the chain store product, the products are not “the same” within the meaning of the exception.

In Albertson's, the state contended unsuccessfully that cut up fryer chickens were a different product from whole body fryers. Albertson’s had sold whole body fryers at twenty-nine cents per pound and cut up fryers at thirty-three cents per pound. Both prices were below cost. Albertson’s could point to other twenty-nine cent whole body fryer prices to justify its price, but there had been no sales of cut up fryers as low as thirty-three cents. The supreme court held that Albertson’s sale, as to both whole body and cut up birds, was within the meeting competition defense, without mentioning the state’s contention that there was no competition as to cut up birds. This treatment may be contrasted with the position of the court in Bornstein Sea Foods, Inc. v. State,\(^4\) where it held that filet of sole was a different product from whole sole for purposes of determining whether there had been a manufacturing process taxable under the business and occupation tax.

C. What is an Endeavor in Good Faith to Meet the Legal Prices of a Competitor?

The problems raised by the good faith requirement include: What actions will establish good faith? What burden is placed on the defendant to ascertain whether his competitor’s prices are legal? What is a competitor? Should the meeting competition exception be re-

\(^7\) It has been held that mere difference in brand name does not prevent a product from being a commodity of “like grade and quality” under § 2(a) of the Clayton Act as amended by the Robinson-Patman Act, which prohibits a seller from discriminating in offering prices to different purchasers of commodities of “like grade and quality”. FTC v. Borden Co., 383 U.S. 637 (1966). The Court carefully notes, however, that it is not deciding whether the same conclusion applies to § 2(b) which permits a seller “to meet an equally low price of a competitor.”

Whether such a distinction can long be maintained under the federal law, it will be noted that under Washington law the question is not whether Brand X and the chain store label are of “like grade and quality” but whether they are the “same article or product.”

\(^4\) 60 Wn. 2d 169, 373 P.2d 483 (1962).
stricted to competition for the same purchasing dollar? How far back in time may a merchant reach to justify his below cost price? May a merchant anticipate future prices?

In practice, these problems seem to resolve themselves into two legal questions: Who has the burden of proof of establishing the legality of the prices met? How far removed in time may the prices met be to constitute competition?

In an early opinion, the Washington court stated:

We are, therefore, of the opinion that if a merchant in good faith reduces his prices to meet those of a competitor, who he in good faith believes has a legal price, he will not be violating either the intent or the wording of the act. (Emphasis added.)

From this language it follows that the merchant need not prove that his competitor's prices were actually legal but merely that he, in good faith, believed them to be so. He may not act in disregard of their legality; if he has reason to believe the prices are illegal, this would, of course, negate his good faith.

As noted above, it is generally held that the burden falls on the defendant to prove each of the elements necessary to bring itself within a defense created by an exception to the statute. Some jurisdictions impose a positive duty on a merchant at least to make an effort to determine if his competitors' prices are legal before he lowers his own.

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75 State v. Sears, 4 Wn. 2d 200, 217, 103 P.2d 337, 345 (1940). This language has been quoted with approval by the California Supreme Court in People v. Pay Less Drug, 25 Cal. 2d 108, 153 P.2d 9, 14 (1944).


77 It is not necessary for a merchant to ask a competitor what he paid for his sale items. Hogue v. Kroger Co., 213 Tenn. 365, 373 S.W.2d 714, 719 (1964):

The second point contends that due process provisions of the Fourteenth Amendment of the United States Constitution are violated because the retailer has no way of determining whether a price set by a competitor (and less than invoice plus eight per cent) is lawful or not. . . .

This contention is without merit. The provisions of T.C.A. § 52-333 sets (sic) out the proper procedure to be followed by 'any person claiming to be injured' by such a possible violation.

In general this section provides that a party so aggrieved may file an original suit for an injunction and for an award of damages, or he may file a complaint with the Commissioner who 'shall forthwith cause an investigation to be made' to determine if the price is lawful.

Similar procedures have been available in Washington. When the statute is enforced with respect to certain commodities, Assistant Attorneys General, whose
In the *Albertson’s* case, however, the majority appears to hold that a grocery merchant is entitled to a presumption that his competitors’ prices are legal.\(^7\)

The state’s principal contention on the meeting competition defense in *Albertson’s* was that the legality of the competitors’ prices was irrelevant because they were too far removed in time to fall within the exception. *Albertson’s* contended that it was meeting a price offered five weeks earlier in Walla Walla, and it also pointed to identical prices of other merchants on the day of its sale.\(^7\) It admitted, however, that it did not know there would be other twenty-nine cent prices when it set its below cost sale price. Rather, it anticipated that this would be the competitive price on the weekend in question.\(^8\)

The majority opinion referred to both the price five weeks earlier and the simultaneous price in sustaining *Albertson’s* defense. The opinion seems to stand for the proposition that prices offered at both times fall within the exception.

There is scant authority on how far back a merchant may go in meeting a price. A California trial court has held that a merchant may meet a price offered six weeks earlier on coffee and soap.\(^8\) In *People v. Payless Drugs*,\(^8\) however, a California appellate court held that a competitor’s sale nineteen days earlier was too far distant from defendant’s sale to be a defense as a matter of law. The decision allowing a merchant to go back six weeks was premised on the assumption that the exception to the statute was to be liberally construed. The identities are well known to merchants would, when requested, ascertain and report back within minutes whether a competitor’s price was above cost.

*But see* Note, 42 Wash. L. Rev. 945 (1967) for a discussion emphasizing the difficulties the seller faces in determining whether a competitor’s prices are legal.

\(^7\) The Court states, 68 Wash. Dec. 2d at 261, 412 P.2d at 759, that the state “... should have offered evidence to overcome the presumption that published prices of its competitors were legal prices.”

\(^8\) The prices in large newspaper ads are typically set about ten days before the ad appears. Although these prices may be changed up until a day or two before the ad appears, a merchant does not know what his competitors’ prices will be until he has seen their ad at which time it is too late to change the price appearing in his ad. Thus, in setting an advertised price allegedly based on the price to be advertised by a competitor at the same time, it is actually necessary to anticipate the unknown future price of the competitor, although past experience may allow a merchant to be reasonably exact.

*Albertson’s* also pointed to several twenty-nine cent prices subsequent to its sale. Although the trial court allowed this evidence and took note of it in its memorandum opinion, the supreme court ignored the subsequent prices. The California court sustained the rejection of evidence of later prices in *Mering v. Yolo Grocery*, 127 P.2d 985 (Cal. App. 1942).


opinion violates the usual rule of statutory construction that when a statute is to be liberally construed, an exception is to be narrowly construed.\textsuperscript{83}

Competition has been defined as "striving for something that is sought by another at the same time."\textsuperscript{84} The Washington court, in allowing a merchant to go back five weeks to meet a price, gives a rather expansive scope to the statutory exception. The *Albertson's* opinion raises a question of what limits, if any, are to be imposed on the prior period of time which can be used to find justifying prices. Should the statute set a period of time for meeting competition or should the period of competition be resolved individually for specific products by reference to the nature of that product, its perishability, the buying habits of the consumer with respect to the product and the consumer's ability to remember prior product prices? Does the meeting competition exception contemplate competition for the same purchasing dollar? If merchant *B* is allowed to go back five weeks to meet merchant *A*’s prices, then five weeks later, merchant *C* will be able to meet merchant *B*’s price, and the below cost price may be perpetuated *ad infinitum*.

The point of greatest significance in the *Albertson's* decision is the court's conclusion that competitors' prices the same day as the Albertson’s sale (which were unknown to Albertson’s when it set its price), constitute competition within the meeting competition exception. Albertson’s was allowed to anticipate that its competitors might sell fryers at twenty-nine cents per pound. If merchant *B* can justify his below cost sale by anticipating that a competitor may be selling at the same price, it follows that merchant *A* and merchant *B* could each offer an item below cost and justify their otherwise illegal below cost price solely through the other’s otherwise illegal price. Further, does it make any difference whether a second merchant actually is selling the item at a low price? Suppose Holiday Bake Shoppe advertises plum puddings for sale below cost at forty-five cents per pound, anticipating that other bakeries may offer plum puddings at that price (presumably legal?) at the same time. Then it develops that Holiday has the lowest price on plum puddings that week. Can not Holiday argue that it was...

\textsuperscript{83} 50 Am. Jur. Statutes § 431 (1944); Spokane v. State, 198 Wash. 682, 693, 89 P.2d 826, 831 (1939).

engaged in a "good faith anticipation" whether or not anyone else actually offered plum puddings at forty-five cents per pound? Is anticipating competition really the same as meeting competition?  

Section 2(b) of the Clayton Act as amended by the Robinson-Patman Act contains language similar to the Washington meeting competition exception. The body of law interpreting the federal act indicates that, not only must the price met be previously known to the seller, but the competitors' price must be the causal motivation for the seller's lowering his price. The Supreme Court of the United States, in interpreting the Robinson-Patman Act, quoted the House Committee Report on the bill with approval: 

[I]t does not permit him to cut local prices until his competitor has first offered lower prices and then he can go no further than to meet those prices.... In other words, the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further. 

The language in State v. Sears appears to be consistent with the federal approach. It must be recognized that the Albertson's decision greatly expands the meeting competition defense in Washington by allowing a merchant to advertise and sell below cost in anticipation of future prices of a competitor. It is questionable whether this expansion is consistent with the purpose of the statute. It allows the exception to be used as a justification for aggressive below cost selling—turning the exception from a shield into a sword.

V. CONCLUSION 

Four simple terms—cost, injury, intent, competition—present many interpretational problems under the Unfair Practices Act. Certainty of operation of the statute would be improved by eliminating cost of 

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53 For the merchant who argues that on occasion he can foresee from the wholesale market conditions that his competitors will be able to secure a product at a lower cost than his and that he should be allowed to "anticipate" their lower prices, the answer is: If this is truly the case, he can establish a lower replacement cost to justify his price. There is no need to warp the meeting competition defense to protect him.


...nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.... (Emphasis added).

55 Pollock, A Checklist on the Meeting Competition Defense, April 1965 Law Notes, Vol. 1 No. 3, ABA Section of General Practice.


57 4 Wn. 2d 200, 103 P.2d 337 (1940).
doing business as a factor. This should be accompanied by redefining invoice and replacement cost to include the cost of all manufacturing or packaging processes that take place on the merchant’s premises.

It may be predicted that when the question is squarely presented, the Washington court will not require proof of intent as an element of a “loss leader” violation. No prediction will be ventured as to whether proof of intent will be required under the sale below cost clause. The statute would be greatly improved by a revision of section 19.90.040 and the “loss leader” definition. Such revision should make clear (1) that intent to injure competitors is not an element of either “loss leader” or “sale below cost” violations; (2) what the difference is between “loss leader” and “sale below cost,” if any; and (3) that all violations require proof of injury to a competitor. Even without legislative revision, proof of injury to a competitor should be equated to a tendency to destroy competition.

In 1966 the court expanded the meeting competition defense to allow a merchant to meet prices offered five weeks earlier, and to anticipate prices to be offered. In the opinion of the writer, this is an unwarranted judicial extension of the exception, inconsistent with the purpose of the state statute and with federal court interpretations of the Robinson-Patman Act. The writer’s opinion, however, may be influenced by his involvement in that case. It now appears to be the law in Washington that a retail merchant (at least in the grocery field) is entitled to a presumption that the openly advertised prices of his competitors are legal.

The breadth given the meeting competition defense by the Albertson’s decision greatly increases the difficulties of enforcing the Unfair Practices Act.
WASH. REV. CODE § 19.90.040 (1959) reads:

*Price cutting practices forbidden—Generally.* It shall be unlawful for any person engaged in business within this state to sell any article or product at less than the cost thereof to such vendor, or give away any article or product, for the purpose of injuring competitors or destroying competition, or to use any article or product as a "loss leader," or in connection with any sale to make or give, or to offer to make or give, any special or secret rebate, payment, allowance, refund, commission or unearned discount, whether in the form of money or otherwise, or to secretly extend to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, or to make or enter into any collateral contract or device of any nature, whereby a sale below cost is effected, to the injury of a competitor, and where the same destroys or tends to destroy competition.

WASH. REV. CODE 19.90.010 (1959) defines "Loss Leader" as follows:

"Loss leader" means any article or product sold at less than cost as herein defined to induce, promote or encourage, the purchase of other merchandise or which may have the tendency or capacity to mislead or deceive purchasers or prospective purchasers, or which diverts trade from or otherwise injures competitors. . . .
WASH. REV. CODE § 19.90.040 (1959) AS INTERPRETED BY THE WASHINGTON COURT IN MARTIN V. ALEINIKOFF:

It shall be unlawful for any person engaged in business within this state

(1) to sell any article or product at less than the cost thereof to such vendor,

(2) or give away any article or product, for the purpose of injuring competitors or destroying competition,

(3) or to use any article or product as a "loss leader,"

(4) or in connection with any sale to make or give, or to offer to make or give, any special or secret rebate, payment, allowance, refund, commission or unearned discount, whether in the form of money or otherwise,

(5) or to secretly extend to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions.

(6) or to make or enter into any collateral contract or device of any nature,

(a) whereby a sale below cost is effected, to the injury of a competitor, and

(b) where the same destroys or tends to destroy competition.
Price cutting practices forbidden—Generally. It shall be unlawful for any person engaged in business within this state

(1) to sell any article or product at less than the cost thereof to such vendor,

(2) or give away any article or product, for the purpose of injuring competitors or destroying competition,

(3) or to use any article or product as a "loss leader,"

(4) or in connection with any sale

   (a) to make or give, or to offer to make or give, any special or secret rebate, payment, allowance, refund, commission or unearned discount, whether in the form of money or otherwise,

   (b) or to secretly extend to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions,

   (c) or to make or enter into any collateral contract or device of any nature,

whereby a sale below cost is effected, to the injury of a competitor, and where the same destroys or tends to destroy competition.
APPENDIX

PART D

SUGGESTED LEGISLATIVE REVISION OF
WASH. REV. CODE § 19.90.040 (1959)
AND “LOSS LEADER” DEFINITION

It shall be unlawful for any person engaged in business within this state

(1) to sell any article or product at less than the cost thereof to such vendor where such sale injures a competitor or tends to destroy competition;

(2) to give away any article or product, for the purpose of injuring competitors or destroying competition;

(3) to use any article or product as a “loss leader,” whereby such article or product is sold at less than the cost thereof to such vendor
   (a) for the purpose of inducing or encouraging the purchase of other merchandise, or
   (b) if such sale may have the tendency or capacity to mislead or deceive purchasers, or prospective purchasers of other articles or products;

(4) to effect a sale of any article or product at less than the cost thereof to such vendor where the same injures a competitor or tends to destroy competition, by
   (a) offering to make or give, or making or giving, any special or secret rebate, payment, allowance, refund, commission or unearned discount, whether in the form or money or otherwise, or
   (b) extending secretly to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, or
   (c) making or entering into any collateral contract or device of any nature.